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Supreme Court U.S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

REECE MORREL, DONALD HERROLD AND  
J. CHARLES SHELTON,  
Petitioners

v.

TRINITY BROADCASTING CORP.,  
A MICHIGAN CORPORATION  
Respondent

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REPLY IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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I.

**This is a matter of imperative public importance requiring immediate review by this Court.**

In its response, Respondent argues that this Court should deny certiorari because the order for which review is sought is interlocutory. Respondent claims that the "minutiae of the required docketing sequence" is not of imperative public importance because it involves neither constitutional nor separation-of-powers issues and is of interest only to these particular litigants.

Respondent has, however, completely overlooked the constitutional significance of the opinion below. This case centers almost *entirely* upon such fundamental constitutional principles as separation of powers and jurisdictional limitations of Article III courts. The overwhelming significance of this case is not due to the jurisdictional ruling of the Court of Appeals on the finality of orders in consolidated actions, an issue over which there is legitimate legal controversy. Rather, the critical significance of this case and what makes it of such imperative public importance is the fact that the Tenth Circuit is proceeding in this matter *in spite of its own finding that it is without subject-matter jurisdiction*.

The Court of Appeals could have held, as did the court in *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir. 1972), that an order in a consolidated case is final and then proceeded to hear the merits without injury to the public or the Constitution. Instead, the Court of Appeals found, as urged by Petitioner herein, that such orders are *not* final. Then, astonishingly, the court announced that it would hear the present matter anyway, because the appellate courts have discretion to "create" finality, and because a lack of jurisdiction is not such a serious thing after the holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In so doing, the Court of Appeals has contravened the power of Congress to limit the jurisdiction of such Article III courts with the passage of 12 U.S.C. § 1291 and 28 U.S.C. § 1254(1). The court has assumed for itself the power to adjust its interpretation of the will of Congress in accordance with the court's own desire to hear a particular matter. Such a decision is also directly contrary to the ruling of the Supreme Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 369 (1981),

that “[b]y definition, a jurisdictional ruling may never be made prospective only.” *Id.* at 379.

II.

**The constitutional issues herein presented cannot be adequately addressed in later review.**

This is not, as Respondent suggests, a matter which may be delayed until later review. First, as Respondent itself points out, if Petitioner herein prevails upon the merits, this matter will remain unaddressed by this Court, and the injury to the authority of both Congress and this Court will stand uncorrected. This case will remain as precedent for the proposition that finality is merely a procedural nicety and that a court of appeals may adjust the parameters of its own jurisdiction according to its own liking. Second, a three way split among seven circuit courts of appeals on an important jurisdictional issue will have gone unaddressed by this Court.

Furthermore, Respondent has not offered any justification for why the Court of Appeals should be permitted to proceed in a matter over which it lacks jurisdiction. In this particular case, a failure to resolve the jurisdictional question at this time will result in serious injury to this litigant. As a result of the court’s wrongful assertion of jurisdiction, these litigants may be required to go to the Oklahoma Supreme Court for answer to certified questions before there is ever any ruling on the merits by the Court of Appeals. Once the Court of Appeals has eventually ruled on the merits, the litigants may then be returned to the district court for what will necessarily be a lengthy and complex trial followed, no doubt, by a second appeal to the Court of Appeals, all before this issue will again be heard before this Court. Thus, it may well be several years and much litigation before there is a final determination on the merits.

When considering this last point, the Court should note that although the order for which review is sought is interlocutory, it is completely unrelated to the merits, so that a ruling on the merits can in no way alter the significance of the interlocutory order or assist with the review of that order. Nor will review by this Court interfere with the actions of the Court of Appeals, except as it may prevent that court from proceeding without jurisdiction. Thus, the Petition for Certiorari is, to a large extent, in the nature of a Petition for a Writ of Prohibition.

Petitioners did not, as Respondent suggests, try an "end run" to the Supreme Court after briefing the merits in the Court of Appeals. Rather, Petitioners vigorously challenged the jurisdiction of the Court of Appeals both in the original briefs and in a Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Certiorari and the brief on the merits were prepared separately and it is only by chance, and by virtue of the time limitations in the Court of Appeals, that the brief on the merits happened to be completed before the Petition for Certiorari.

Furthermore, Respondent is mistaken when it suggests that it may still be entitled to a later appeal because the other action is still pending in the District Court. The certification by the district court that the order was final had the effect of starting the time limitations for appeal. When Respondent failed to perfect its appeal, then the right to appeal was forever lost and would not be revived by additional orders in the district court.

III

**The facts of this case present these issues as clearly as could any other case.**

Respondent asserts that the issues herein are not clearly presented. However, the issues could not possibly be more clearly presented. While other cases may require an examination of the nature and extent of the consolidation, this particular case does not. This is because in the present matter, the claims were all brought by a single plaintiff. The Plaintiff could have brought all the claims in one action but failed to do so. On the plaintiff's own motion, the district court consolidated the actions for all purposes. Thus, the only way in which the order in the present case could be deemed final is if this Court determines that Rule 54(b) *never* applies to consolidated actions.

**CONCLUSION**

Respondent argues that all that is at stake in this case are mere "fine points of practice" and the "mere etiquette of justice." Far from being mere "minutiae of docketing", the limitations of 12 U.S.C. § 1291 and 28 U.S.C. § 1254(1) are placed upon the courts of appeals by Congress pursuant to the authority of Article III of the United States Constitution. When a court ignores these constitutional limitations, it is in effect challenging the right of Congress to limit its jurisdiction. The ramifications of such a decision simply cannot be overstated.

In the opinion below, the Tenth Circuit asserts that finality is discretionary, and that it may proceed without jurisdiction if it chooses to do so. Furthermore, the Tenth Circuit has expressly stated its intent to disregard the contrary admonition of this Court in *Firestone*. For these reasons, the present matter is of such imperative public importance that a Writ of Certiorari

should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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